

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EDUARDO ARCE GONZALEZ,

Respondent,

v.

ROSA TERESA GUTIERREZ,

Appellant.

D040063

(Super. Ct. No. D469631)

APPEAL from orders of the Superior Court of San Diego County, H. Ronald Domnitz; Steven R. Denton, Judges. Reversed in part and remanded.

Rosa Teresa Gutierrez (Rosa) appeals after the family court entered orders under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), registering a Mexican divorce decree pertaining to Rosa's former marriage to Eduardo Gonzalez (Eduardo) and enforcing the parties' child custody agreement contained in the Mexican decree.

Rosa contends the court erred in (1) rejecting her argument that the UCCJEA action was barred by the res judicata doctrine; (2) refusing to properly consider whether to impose certain conditions on Eduardo's visitation with the children; (3) refusing to properly consider the impact of her concurrent political asylum petition; (4) failing to request that the Mexican court decline to exercise jurisdiction over the child custody issues; and (5) awarding attorney fees to Eduardo as the prevailing party.

We conclude the court properly found the UCCJEA action was not barred by the res judicata doctrine, but that the court erred in determining it had no discretion to impose conditions on Eduardo's visitation to ensure Rosa's right to continued custody of the children. We remand for the court to exercise its discretion on this matter. We vacate the attorney fees award because the prevailing party may change on remand. We reject Rosa's remaining contentions.

FACTUAL AND PROCEDURAL BACKGROUND

Rosa and Eduardo, both Mexican citizens, were married in Guadalajara, Mexico in December 1992, and had two children, a daughter, born in 1993, and a son, born in 1997. During the marriage, Eduardo verbally and physically abused Rosa in the presence of the children.¹ Because of the escalating abuse, in 1999 Rosa filed for a fault-based divorce. Eventually, Rosa agreed to a mutual consent divorce because she believed it would offer her more immediate protection.

¹ The specific facts surrounding the parties' marriage and dissolution are detailed in a published Ninth Circuit decision involving the same parties. (*Gonzalez v. Gutierrez*

In August 2000, a Mexican family court granted the divorce based on a stipulated agreement of the parties. As translated, the Mexican judgment set forth the parties' agreement as follows:

"[The] minor children . . . will remain under the custody and care of [Rosa], at the property located on Francia Street, number 1635-b . . . in this City of Guadalajara, Jalisco.

"[Eduardo] will be able to visit his minor children on Monday, Wednesday and Friday from 14:00 to 17:00 hours every week. The father will also be able to take the children with him for the weekend every other week, and take them on vacation 2 weeks per year, as long as this does not interfere with the health and education of the minors.

"[Eduardo] must grant full authorization according to law, until they reach adult age, on every occasion that his minor children . . . seek to leave the country accompanied by their mother . . . or any other person." (Italics added.)

After the divorce, Eduardo continued to physically and emotionally abuse Rosa in front of the children. (*Gonzalez, supra*, 311 F.3d at pp. 946-947.) Because she was unable to obtain any assistance from Mexican authorities, Rosa made the decision to leave the country with her children. In late February 2001, Rosa took the children to her sister's home in San Diego without Eduardo's permission. Upon arriving in the United States, Rosa applied for political asylum for herself and the children based on her status as a domestic violence victim.

In October 2001, Eduardo filed a petition in San Diego Superior Court for the return of the children to Mexico under the International Child Abduction Remedies Act,

(2002) 311 F.3d 942, 946 (*Gonzalez*.) We reiterate only those facts necessary to

which implements an international treaty known as the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as the Hague Convention). (42 U.S.C. §§ 11601-11610.) Under this treaty, a parent who has "rights of custody" may file a petition seeking return of the child when the child is wrongfully removed from the home country. (*Gonzalez, supra*, 311 F.3d at p. 945.) Rosa removed the action to federal district court. (*Id.* at p. 947.) We shall refer to this federal action as the Hague Convention action.

In the Hague Convention action, Rosa opposed Eduardo's petition based on her arguments that Eduardo had no standing to compel removal of the children under the Hague Convention because he did not have custody rights at the time of the removal and returning the children to Mexico would expose them to a grave risk of harm because of Eduardo's prior abuse of Rosa. After an evidentiary hearing, the district court concluded that Eduardo's visitation rights entitled him to seek return of the children and found that although "there is evidence that [Eduardo] had abused [Rosa] in the past, such evidence does not rise to the level that other courts have found warrant a finding of a grave risk of harm to the children." On December 6, 2001, the district court entered an order finding the children had been wrongfully removed in violation of Eduardo's rights and that Rosa had failed to establish any affirmative defenses that would prevent their return. Accordingly, the district court ordered that the children be returned to Mexico by

deciding the issues raised in this appeal.

December 21, 2001. Several days later, the district court stayed its order pending Rosa's filing an appeal in the Ninth Circuit.

Rosa then filed her Ninth Circuit appeal challenging the district court's findings in the Hague Convention action. (*Gonzales, supra*, 311 F.3d at p. 948.) While this federal appeal was pending, the parties disputed the scope of Eduardo's visitation rights with the children in the United States. Rosa expressed willingness to permit Eduardo to visit with the children, but was concerned that if Eduardo was permitted to visit alone with the children he would take the children back to Mexico with him, which could jeopardize the asylum petitions of her and her children and would prevent her from seeing the children because of the possibility that Eduardo would continue to physically abuse her in Mexico. Rosa therefore refused to permit Eduardo to visit with the children unless he was accompanied by a professional supervisor. Eduardo, on the other hand, objected to any restrictions on the visitations and asserted that he had the full right under the Mexican divorce decree to regularly visit with his children without supervision.

Seeking to resolve these issues, in January 2002, Eduardo filed a UCCJEA petition in San Diego Superior Court, seeking to register his Mexican divorce decree and to enforce the child sharing plan as contained in the decree. (Fam. Code, § 3400 et seq.)² The UCCJEA contains jurisdictional principles for initial custody determinations and modifications of such determinations, and also governs the recognition and enforcement of foreign custody orders. (See §§ 3421, 3422, 3443; *Brown v. Brown* (1999) 71

² All further statutory references are to the Family Code unless otherwise specified.

Cal.App.4th 358, 365.) In his prayer for relief, Eduardo sought an order registering and enforcing the Mexican judgment and "[f]or assistance from law enforcement officials in effectuating enforcement of the registered judgment"3

Rosa moved to quash the UCCJEA petition, arguing the enforcement action was barred by the res judicata doctrine because Eduardo could have raised the UCCJEA enforcement issues in the Hague Convention action.⁴ On March 22, Superior Court Judge Ronald Domnitz held a hearing during which he denied Rosa's motion, finding that Eduardo's UCCJEA petition was not barred by res judicata. At that hearing, Eduardo's counsel made clear that Eduardo was not "requesting the children be returned back to Mexico," and instead that he was asking only for visitation "in the U.S." The court continued the hearing to April 15 to permit Superior Court Judge Steven Denton to resolve the visitation issues and other enforcement matters.

In papers filed for the hearing on the enforcement issues, Rosa clarified that she did not oppose Eduardo visiting with the children one week during each month and two full weeks during the summer, or two weekends per month. She objected, however, to the visits taking place in Mexico because (1) of her pending asylum application; (2) she

³ Eduardo had previously filed a substantially similar petition, but never pursued this petition because it was procedurally defective.

⁴ Rosa also sought relief in the Ninth Circuit by filing a motion requesting that the federal court determine the state superior court action was barred by res judicata. The Ninth Circuit summarily denied the motion, but placed the Hague Convention appeal on an expedited briefing schedule.

had a "severe, justified fear that [Eduardo] will not return the children to the United States"; and (3) she "is terrified at the likely severe physical retribution she will experience at the hands of [Eduardo] if she were to return to Mexico." Rosa requested that the court order that Eduardo not remove the children from California and require Eduardo to post a bond sufficient to assure compliance with this order. Rosa further requested the court contact the Mexican court "so that this Court may permanently order a visitation schedule appropriate for long distance visitation."

At the April 15 hearing, Rosa's counsel stated that Rosa did not object to the Mexican decree being registered in California, but again urged the court to condition Eduardo's visitation with the children on his not removing the children to Mexico. Rosa's counsel alternatively requested the court to stay the UCCJEA action pending final resolution of the Hague Convention action and Rosa's asylum petition. Eduardo's counsel opposed the court placing conditions on his visitations with the children, arguing the proposed conditions would constitute an improper modification of the Mexican decree. Eduardo further opposed the request for a stay, but again made clear that he was not asking the court to order the children returned to Mexico.

During the hearing, the court and parties discussed at length whether the court should assume temporary emergency jurisdiction under section 3424, given that the Hague Convention action and the asylum matter had not yet been resolved. After this discussion, the court continued the hearing to permit the court to "communicate with the judge in Guadalajara" regarding certain visitation issues and "whether or not [the Mexican court] wishes to continue to assert jurisdiction over the matter and, if so,

whether or not it has any clarifying information as to the nature of the order." The court also asked counsel to file supplemental briefing regarding the issue whether the court had the authority to stay the UCCJEA matter because of the pending Ninth Circuit appeal and asylum case.

Before the April 30 hearing, the court notified counsel that it had communicated with the Mexican court having jurisdiction over this matter and provided counsel with a transcript of the telephone conversation. At the final April 30 hearing, Rosa's counsel acknowledged she had reviewed the transcript and that based on the conversation it "appears [the Guadalajara court] is not willing to concede jurisdiction [to the San Diego court]."

On May 17, the court issued its final written order on Eduardo's UCCJEA petition. As is relevant here, the court made the following findings. First, the court found the Mexican divorce decree registered by Eduardo "governs the [parties'] child custody and visitation arrangements" and that there was no legal or factual basis, including the court's temporary emergency jurisdiction or the pending asylum application, for the court to refuse to enforce the decree.⁵ Second, the court found Rosa's proposed conditions on Eduardo's visitation rights, i.e., ordering Eduardo not to leave California during the visitations and to post a bond, would constitute an impermissible modification of the

⁵ As part of this finding, the court acknowledged that a foreign child custody order need not be enforced if the foreign country's child custody law "violates fundamental principles of human rights" (§ 3405, subd. (c)), but found this exception inapplicable because "there is no evidence that the child custody law of Mexico violates fundamental principals of human rights."

Mexican divorce decree. Third, the court entered orders enforcing the express terms of the Mexican decree, including that the children should remain in Rosa's custody, and Eduardo would have visitation rights as set forth in the decree ("Mondays, Wednesdays, and Fridays, from 2:00 p.m. until 5:00 p.m. . . . [,] on alternate weekends[,] [and] two weeks per year [for vacation], as long as this does not interfere with the health and education of the minors"). Pursuant to Rosa's request, the court ordered the exchanges to take place at a neutral setting identified as Real Solutions, and stated that "[i]t is the express intent of this court that exchanging the children at Real Solutions will not constitute a modification of the underlying Mexican divorce decree" The court further found that Eduardo was the prevailing party and ordered Rosa to pay Eduardo attorney fees of \$2,500, to be paid \$50 per month.

Rosa filed a notice of appeal from this order and from the earlier March 2002 order denying her motion to quash the petition based on the res judicata doctrine. The parties thereafter notified this court of two subsequent judicial rulings relevant to the parties' custody dispute.

First, in June 2002, a United States Immigration Judge found Rosa proved she qualified for political asylum, i.e., she demonstrated she was persecuted based on her membership in a particular social group (defined as Mexican women who have suffered domestic violence) and she was unable to avail herself of her country's protection. (See INA § 101(a)(42)(A).) Although the Immigration and Naturalization Service (INS) initially appealed the Immigration Judge's decision, the INS withdrew that appeal on

December 18, 2002, and therefore the grant of asylum to Rosa and the children became final.

At about that same time, the Ninth Circuit filed its decision in the Hague Convention matter, reversing the district court judgment based on its conclusion that under the terms of the Hague Convention, "a child's removal is wrongful only if the parent's *custody* rights are breached" and visitation rights are not equivalent to custody rights under the treaty. (*Gonzalez, supra*, 311 F.3d at pp. 948, 954, italics added.) The court stated that "the remedy of return is not available to a parent who possesses only access rights, even if he also benefits from the inclusion of a *ne exeat* clause in the relevant custody agreement."⁶ (*Id.* at p. 954.) The court further rejected Eduardo's argument that the Mexican legal concept of *patria potestas* conferred upon him custody rights under the Convention, explaining that the formal legal custody agreement entered into by the parties "eliminat[ed] any basis for relying on *patria potestas*." (*Ibid.*) Accordingly, the court reversed the district court judgment with directions to dismiss Eduardo's Hague Convention petition. (*Ibid.*)

⁶ "A *ne exeat* clause is defined as a 'writ which forbids the person to whom it is addressed to leave the country, the state, or the jurisdiction of the court.'" (*Gonzalez, supra*, 311 F.3d at p. 947, fn. 8, quoting Black's Law Dictionary (6th ed. 1990) p. 1031, col. 2.)

DISCUSSION

I. *The UCCJEA Action is Not Barred by Res Judicata Doctrine*

Rosa first contends the court erred in rejecting her argument that Eduardo's UCCJEA petition was barred by the res judicata doctrine because he could have joined the UCCJEA action with the Hague Convention action.

A. *Applicable Legal Principles*

Under the res judicata doctrine, a party is prohibited from splitting a single cause of action and bringing successive actions on parts of the claim. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897 (*Mycogen*).) The first action on the single cause of action operates as a merger even though the plaintiff seeks to assert a theory in the second action that was not presented in the first, or seeks remedies or forms of relief not demanded in the first action. (*Ibid.*) These principles apply to family law matters. (See *Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1515; *Robert J. v. Leslie M.* (1997) 51 Cal.App.4th 1642, 1647.)

In California, the primary right theory determines whether two separate actions concern a single cause of action. (*Mycogen, supra*, 28 Cal.4th at p. 904.) Under this theory, "a "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] [¶] "[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: . . . The primary right must also be distinguished from the *remedy* sought: "The violation of

one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.'" [Citation.]" (*Ibid.*) Under these principles, "the harm suffered" is "the significant factor" in defining a primary right. (*Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1301; accord *Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340.)

Applying these concepts, the Hague Convention action and the UCCJEA action concern two different primary rights. In the UCCJEA action, Eduardo sought to enforce his right to visit with the children in the United States while they were residing here. Thus, in that action, the harm suffered was the loss of visitation with the children. In contrast, in the Hague Convention action, Eduardo sought the return of the children to Mexico based on a violation of his right to prevent the children from leaving the country. (*Gonzalez, supra*, 311 F.3d at p. 947.) This right to prevent his children from leaving his home country concerned a qualitatively different matter than Eduardo's right to visit with his children. It involved Eduardo's right to determine his children's place of residence, which directly affected his ability to influence numerous aspects of the children's daily life, including their education, language, extended family relationships, and health care. Because Eduardo alleged a different type of harm in the UCCJEA action, that action was not barred by the previous judgment in the Hague Convention action.

Rosa maintains the Hague Convention action concerned the same primary right at issue in the UCCJEA action because both actions concerned Eduardo's "right to withhold permission to leave Mexico and his right to be with his children in Mexico." Although

this primary right reflects the Hague Convention action claim, it does not accurately describe the UCCJEA action. In the UCCJEA action, Eduardo repeatedly made clear that he was merely asking the court to enforce his visitation rights contained in the Mexican decree so he could visit his children in the United States. Although Rosa argues that "no attempt has been made to deprive [Eduardo] of visitation in the United States," this is precisely the issue that triggered the UCCJEA action — Rosa's unwillingness to permit Eduardo to visit with the children without being supervised.

Further, the fact that Rosa believes Eduardo could have unilaterally made the decision to take the children to Mexico during the visitation, and thus obtain the same result he was seeking in the Hague Convention action, does not make the res judicata defense applicable. In determining the applicability of the doctrine, the focus is not on the ultimate remedy sought, but on the particular harm alleged to have been suffered. (See *Mycogen, supra*, 28 Cal.4th at p. 904; *Branson v. Sun-Diamond Growers, supra*, 24 Cal.App.4th at pp. 341-342.) We are also unpersuaded by Rosa's emphasis on the fact that Eduardo could have brought the two claims in the same action. (See § 3442.) Whether Eduardo could have joined the claims is a different issue than whether he was required to do so under res judicata principles. (See *Sawyer v. First City Financial Corp.* (1981) 124 Cal.App.3d 390, 398-399.) Finally, the fact that Eduardo's rights to relief in both actions originated from a single document — the Mexican divorce decree — is not determinative. A single wrongful act by a defendant may invade more than one primary right and, therefore, can create more than one cause of action. (*Branson v. Sun-Diamond Growers, supra*, 24 Cal.App.4th at pp. 342-343.)

We conclude the court correctly found Eduardo's UCCJEA petition was not barred by the res judicata doctrine.

II. *Court had Discretion to Impose Certain Restrictions on Eduardo's Visitations*

Rosa contends the family court abused its discretion in concluding it had no authority to issue an order prohibiting Eduardo from removing the children from California during his visitations and requiring Eduardo to post a bond to ensure compliance with this order.

A. *Applicable Statutory Principles*

Under the UCCJEA, "a child custody determination issued by a court of another state [or foreign country] may be registered in this state, with or without a simultaneous request for enforcement" (§§ 3445, 3405.)⁷ The grounds for objecting to a registration are that the issuing court did not have jurisdiction, the objecting party did not have notice, or the order is no longer valid. (§ 3445, subd. (d).) If there is no objection to the registration, the foreign custody order is registered as a matter of law. (§ 3445, subd. (e).)

Once the order is registered, any party may move to enforce the order under the UCCJEA. Under section 3443, subdivision (a), a "court of this state *shall* recognize and enforce a child custody determination of a court of another" if the other court's

⁷ Section 3405 provides that the registration and enforcement of a foreign court custody order shall be governed by the same principles as an order from another state if the order was made under "factual circumstances in substantial conformity" with certain specified jurisdiction standards, unless "the child custody law of a foreign country violates fundamental principles of human rights." (§ 3405, subs. (b) & (c).)

determination satisfies certain jurisdictional standards. (§ 3443, subd. (a), italics added.) But in enforcing the foreign court's order, the California court "*may not modify*, except in accordance with Chapter 2 (commencing with Section 3421), a registered child custody determination" of the other court. (§ 3446, subd. (b), italics added.) The exceptions to this rule against modifying a child custody order are contained in sections 3423 and 3424. Section 3423, subdivision (a), concerns the situation where the foreign court determines it no longer has exclusive, continuing jurisdiction or that California would be a more convenient forum, and/or it has been found that "the child, the child's parents, and any person acting as a parent do not presently reside in the [foreign] state." (§ 3423, subds. (a) & (b).) Section 3424, subdivision (a), provides that "[a] court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse."

B. *Analysis*

In this case, the court denied Rosa's request that it place conditions on Eduardo's visitations because it believed these conditions would constitute an improper modification of the Mexican child custody orders under section 3446, subdivision (b). This reasoning ignores the realities of the situation and too narrowly interprets the relevant statutes.

As the parties and court recognized, the Mexican divorce decree could not be enforced as written because of the actual change in circumstances, i.e., the children were

now living in the United States and their removal to Mexico was subject to a federal court stay order. Acknowledging this change of circumstances, Eduardo did not seek to enforce the order according to its precise terms because that would have required the court to order the visitations to occur in Mexico, and Eduardo expressly stated he was not asking the court to order the children removed to Mexico. Instead, Eduardo asked the court to enforce only the time-sharing visitation provisions of the decree, i.e., that the visitations in the United States were to take place every other weekend and for two weeks for vacation.

There was evidence, however, that Eduardo intended to take the children back to Mexico during his visitations. Throughout the proceedings, Eduardo consistently took the position that although he was not asking the court to order the children returned to Mexico, he had the full right to bring the children back to Mexico, thereby depriving Rosa of her custody rights. Eduardo continues this position on appeal, stating in his appellate brief: "In all due candor, we believe that ever since the Mexican court order was registered by the [San Diego] Superior Court, [Eduardo] has had the right to take his children back to Mexico even if the Superior Court did not specifically state that he could. We base this opinion on the belief that [Eduardo] can do anything he would like with his children as long as his actions do not violate any court orders or any laws." Eduardo's counsel reiterated this position at oral argument on appeal.

As Rosa argued below, Eduardo's taking the children back to Mexico would have interfered with the essential foundation of the Mexican decree — that Rosa was to

maintain full legal and physical custody of the children.⁸ Rosa presented substantial evidence that, as a practical matter, she would no longer have custody of the children if the children were returned to Mexico because she would be subject to retribution and abuse from Eduardo in that country and she could not obtain protection from the authorities. Rosa further presented evidence that Eduardo's proposed actions would have mooted her pending Hague Convention appeal and diminished her rights and the children's rights as asylum applicants. Rosa additionally made clear that she was seeking the imposition of the conditions as a temporary solution pending the resolution of the federal actions, which would then permit the parties and court to address the long-term implications of the changed circumstances. In short, without a court order prohibiting Eduardo from removing the children during his visitations, an order permitting visitation would in fact undermine and modify the primary aspect of the Mexican divorce decree which was to ensure Rosa's continued full custody of the children.

The UCCJEA specifically provides a California court with the authority to "utilize any remedy available under other laws of this state to enforce a child custody determination made by a court of another state [or country]." (§§ 3443, subd. (b), 3405, subd. (b).) Under California law, a court may condition visitation on a parent not leaving a particular jurisdiction, and may enforce its orders by requiring a parent to post a sufficient financial bond to ensure compliance with the court's judgment. (See *Moffat v.*

⁸ We recognize the Mexican decree awarded mother full legal and physical custody at a specific address in Mexico. However, we are satisfied that that reference does not

Moffat (1980) 27 Cal.3d 645, 652; *In re Marriage of Abargil* (2003) 106 Cal.App.4th 1294, 1303.) The court may also require supervised visitation in a neutral setting.

Under this authority and given Eduardo's expressed intentions, the court would not have violated section 3446, subdivision (b)'s "no-modification" rule by imposing limited conditions on the visitation, including ordering Eduardo not to remove the children from the state, and to obtain a bond to ensure his compliance with this order. These conditions would have effectuated the central intent of the divorce decree: to maintain Rosa's full legal and physical custody of the children. Further, the conditions would not have significantly abridged the reasonable visitation rights agreed upon by the parties and ordered by the Mexican court. Instead, the conditions would give effect to, and enforce, the visitation *and* custody rights "which through changed circumstances could no longer be effectuated as they were initially prescribed." (*Creed v. Schultz* (1983) 148 Cal.App.3d 733, 742.) Such enforcement is consistent with the UCCJEA, and does not necessarily constitute an impermissible modification of a child custody order. (*Ibid.*)

Our determination that the court erred in concluding it had no discretion to impose the proposed visitation conditions requires that we remand to permit the court to exercise its discretion on these issues. (See *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392 [a ruling will be "'set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law'"].) We decline Rosa's suggestion that we order the court to impose those conditions as a matter of law. Because

negate the conclusion the parties fully intended to award full legal and physical custody

the propriety of such conditions potentially depends on the resolution of factual issues regarding Eduardo's intent and the current situation of the parties, it would not be proper for this court to rule on these issues as a matter of first impression. This is particularly true because the circumstances have substantially changed since the challenged rulings. In the proceedings below, the focus of the parties and court was on the need for a temporary solution pending the conclusions of the asylum and Hague Convention matters. At this point, those matters have been resolved. The Ninth Circuit has held that Eduardo may not obtain removal of the children under the Hague Convention, and the petitions of Rosa and the children have been granted. These decisions have dramatically changed the state of affairs and their import is a relevant factor in formulating proper enforcement orders. In defining such orders on remand, the court must be mindful not only of the Mexican decree but of the importance of delineating the order in such a way that it does not undermine the grant of asylum and the denial of relief under the Hague Convention.

III. *Rosa's Political Asylum Application*

In her opening appellate brief, Rosa contends the court erred in refusing to stay the UCCJEA action while her asylum application was pending. As she did below, Rosa argues the court had jurisdiction to stay the action under the court's "temporary emergency" jurisdiction (§ 3424) and/or under various federal treaties and human rights laws. However, this issue is now moot because the asylum application is no longer

under all circumstances to the mother and visitation to the father.

pending. Because the asylum application has been granted, the issue whether the court should have exercised its "temporary emergency jurisdiction" or found the federal statutes applicable to temporarily stay the UCCJEA action is no longer before us.

We reject Rosa's additional argument that the fact that she and the children now possess asylum status wholly preempts the UCCJEA action. Generally, preemption is a question of federal congressional intent, and it is the burden of the party claiming preemption to prove this intent. (See *Viad Corp. v. Superior Court* (1997) 55 Cal.App.4th 330, 333.) Rosa has not cited, and we have not found, any authority supporting that Congress intended the political asylum laws to broadly preempt the uniform statutory scheme pertaining to custody matters. Further, there is nothing in the asylum law and the UCCJEA that inherently conflicts so that a UCCJEA action would be necessarily barred.

Rosa additionally raises several new arguments pertaining to her current asylum status and how this status affects the court's enforcement orders. Because these issues were not raised in the court below and potentially require the resolution of factual issues pertaining to enforcement, they are not properly before us at this time. Rosa is entitled to raise these issues on remand.

IV. *Family Court's Communication with Mexican Court*

Rosa next challenges the adequacy of the court's communication with the Mexican court. Specifically, Rosa argues the court "erred by neglecting to ask the Mexican court whether it would be willing to decline to exercise jurisdiction" and therefore allow the California court to unilaterally modify the Mexican divorce decree.

This argument fails for several reasons.

First, Rosa never raised this objection below. Rosa and her counsel had a full opportunity to review the transcript of the conversation between Judge Denton and the Mexican court before the final hearing. If Rosa believed Judge Denton did not adequately discuss a particular subject with the Mexican court, she should have raised this issue with the court at the time. The court could have easily arranged an additional telephone call to correct this asserted error, or explained why it believed it had adequately addressed the subject during the phone conversation. Absent a proper objection below, Rosa has waived her right to assert the issue on appeal.

Second, Rosa has not provided a proper record for us to review her contention. Rosa did not include in the appellate record a copy of the transcript of the conversation between Judge Denton and the Mexican court. Without the transcript, it is impossible for this court to determine whether Judge Denton in fact failed to ask the proper questions of the Mexican court. In fact, from the record we do have, it appears that Judge Denton did at least indirectly ask the Mexican court about the jurisdiction issue. As Rosa's counsel noted in the April 30 hearing, it was implicit in the phone conversation that the Mexican court would not have conceded jurisdiction to the United States.

Finally, even if Rosa had not waived her claim and had provided a proper record to support her contention, Rosa has failed to show the court did not comply with a statutory duty. Section 3410 permits courts of this state to communicate with a court of another jurisdiction pertaining to a UCCJEA proceeding. However, it does not contain any specific requirements as to the substance of the required conversation. In attempting

to establish a duty in this case, Rosa relies on section 3427, subdivision (a), which provides that a *California* court may decline to exercise jurisdiction of a child custody matter because the California forum is "inconvenient." This code section does not mandate a California court to request the court of another jurisdiction to decline to take jurisdiction based on principles of inconvenient forum. Rosa's reliance on section 3428 is similarly misplaced. Section 3428 concerns a California court's right to decline to exercise jurisdiction if the person seeking to invoke the jurisdiction has "engaged in unjustifiable conduct." There is nothing in this code section imposing an affirmative duty on the court here to have requested the Mexican court to find that California was an appropriate forum to relitigate custody issues.

V. *Attorney Fees*

Rosa contends the court erred in ordering her to pay \$2,500 reflecting Eduardo's attorney fees incurred in litigating the UCCJEA action.

The court awarded the fees under section 3452 which provides a "court shall award the prevailing party . . . necessary and reasonable expenses incurred by or on behalf of the party . . . unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate." Based on our determination that the matter must be reversed and remanded for the court to exercise its discretion on the issue of the enforcement of the Mexican decree, the prevailing party attorney fee award must necessarily be vacated. We thus do not reach Rosa's contentions that the \$2,500 award was "clearly inappropriate."

DISPOSITION

We affirm the March 22, 2002 order finding Eduardo's petition for enforcement is not barred by the res judicata doctrine.

We reverse the order of May 17, 2002, to the extent that the court found that Rosa's proposed conditions on Eduardo's visitation rights would necessarily constitute improper modifications of the underlying Mexican divorce decree. We remand for the court to consider whether any such conditions should be imposed and to consider the effect of any new circumstances, including the grant of asylum, on the enforcement of the registered decree. We vacate the attorney fees award, for a determination of which party, if any, meets the definition of a prevailing party in this matter.

The parties to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.